RECENT LEGAL LITERATURE

A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, including the Statutes and Judicial Decisions of all Jurisdictions of the United States. By John Henry Wigmore, Professor of the Law of Evidence in the Law School of Northwestern University. Boston: Little, Brown and Company, 1904, 1905. Four volumes, pp. lv, 3921.

Since the publication in 1842 of Professor Simon Greenleaf's first edition of his Law of Evidence, there have been published in this country several works on this subject, certain of which purport to cover the whole range of the subject and others but particular phases of it. It is not till the publication of several articles by Professor James B. Thayer of Harvard University, upon some of the more difficult phases of the general subject, that we find much that can be said to have been written from the scholarly, as distinguished from the strictly practical, point of view. These articles, with additional material of the same sort, were gathered together in a single volume and published in book form in 1898 under the title, "A Preliminary Treatise on Evidence at the Common Law." It was Professor Thayer's announced intention to publish later a more general work on the law of evidence, but his death prevented the carrying out of that intent, and the publication of such a work has fallen into other hands. The year following the publication of Professor Thayer's book the first volume of the sixteenth edition of Greenleaf's work was published, with Professor Wigmore as its editor. His work on the Greenleaf marked him as a discriminating student of the law of evidence in thorough sympathy with the work of Professor Thayer. Indeed, it is quite evident that except for the work of Professor Thayer this work on the Greenleaf and on the present great book would have been an even larger undertaking. When the announcement was made that Professor Wigmore was to publish a work covering the general law of evidence the profession were prepared to expect an exhaustive treatise, the result of intelligent and tireless research, by a ripe scholar on this branch of law—and they are not disappointed. It is not too much to say, judging from evidence open to the public, that no man of his generation, except it may have been Professor Thayer, was so competent to write a work on this subject from the scholar's point of view.

An analysis of this work discovers that Book I, comprising the 3519 pages of text found in Volumes I, II, III, and all but about 100 pages of Volume IV, is given to the discussion of the general subject of "Admissibility"; Book II contains a discussion of the subjects of "Burden of Proof" and "Presumptions" in about 70 pages. Book III, a discussion, in ten pages, of the provinces, respectively, of the judge and the jury in the reception of evidence, and Book IV is given to the Law of "Judicial Notice" and occupies 30 pages. Book I is subdivided into Part I, treating of "Relevancy"; Part II discussing what is called "Auxiliary Probative Policy," including the law of the old rule of "best evidence," the "hearsay rule" and allied topics; Part III discussing "Rules of Extrinsic Policy" is given to a treatment of the law of

"privilege" as applied to witnesses, and part IV, which is given over to a statement of the law of the parol evidence rule from a point of view new in the Greenleaf edited by Professor Wigmore. These parts are divided again and subdivided for purposes of more particular discussion. It is to be noticed in the outset that the manner of treatment differs from that of other extended works on this subject, in not giving up a specific portion of the work to a treatment of the general principles, and the remainder, and much larger part, to statements of rules applicable to particular classes of cases. His whole treatment is upon the theory of developing the principle from the decisions and then tracing its application wheresoever it may lead; a method of treatment rational and scientific, and, by reason of the applicability of general principles to many classes of cases, a method likely to avoid much repetition.

The work is given to something more than a statement of the rules of evidence as they obtain today, and includes the history of the law of evidence so far as helpful to an understanding of its more difficult portions. The author does too, what we would expect one to do whose experience with his subject has been with its theoretical as distinguished from its practical side, he emphasizes, not unduly, in the judgment of the reviewer, the scholarship side of his treatment. The attitude of the author is that indicated by the quotation from Sir James Stephens and referred to in his preface; he believes that if he would give a "complete account of any branch of the law" his work "ought to consist of three parts * * * * *; these parts are, Its history; a statement of it as an existing system; *a critical discussion of its component parts with a view to its improvement.*" The author is certainly refreshing, in contrast with the writers of much of our modern legal literature, in the vigorous way in which he has done the work referred to in the last paragraph of the quotation. This is well illustrated in the paragraph on "Testimonial duty of Corporal Exhibition." After saying that some courts refuse to command it, on the theory that there is no appropriate process to coerce such exhibition, he says: "But how culpable is this self-stultifying concession by a court of justice, that it knows of no process to execute its powers for enforcing a conceded duty! There cannot be a precise precedent for everything. Where there is a clearly established principle, the lack of a precedent is no obstacle. * * * * The ordinary subpœna for a witness is of no avail when he is in prison; but the judges, somebody, sometime—no one knows who nor when—varied the form of words and ordered the jailor *habeas corpus ad testificandum.* They did not supinely sit and watch justice defrauded of testimony because the usual piece of parchment did not precisely fit the exigency." And again in connection with this same subject of corporal exhibition, after quoting from the opinion in Union Pacific Ry. Co. v. Botsford, 141 U. S. 250, 11 Sup. 1000, denying the authority of the court under our law to compel such exhibition, the author says: "On such a basis of assumptions, indeed, not even Iago's conclusion was more lame and impotent. 'To lay bare the body without lawful authority,' we are told, 'is a trespass.' But this is wholly beside the point; it is precisely *with* lawful authority, to wit, that of the court, that the plaintiff is to be inspected. * * * *

We are further told that there are no instances of exercising this power in civil cases, except in a few cases coming down from ruder ages, now mostly obsolete in England and never introduced into this country. This slur upon the inherited principles of 'ruder ages' would be equally applicable to the fundamental clauses of Magna Carta and the Bill of Rights—documents, be it noted, which an illustrious court has been known to treat, in other connections, with even over-ready respect for their antiquity. Moreover, the significance of the writ *de ventre*—if that is the 'rude' expedient referred to—is simply this, that in an epoch and a country where landed rights were a paramount and constant concern in litigation, the courts were not deterred by a false delicacy from taking such measures as common sense required for determining the truth. * * * * One might as well have argued, after Stephenson's steam monsters had first begun to travel their iron roads, that a person who was run over by a negligent driver of one of the new fangled locomotives, would have no action on the case for his injuries, because there were no precedents, forsooth, except for injuries by ox-carts and hackney-coaches. There is and will be no end to the variety of frauds invented; and it will be an ill day for justice when the courts cease to meet new frauds by new applications of old remedies." Another characteristic illustration of this side of his discussion is found in his treatment of the rule limiting the pedigree exception to questions of descent. "Any such arbitrary and unreasoning limitation places the rules of evidence on a par with the rule of chess that a king may move one square only, or the rule of whist that the card played must follow the suit led—rules, that is, which justify their existence because they add complexity, and therefore interest, to the game. If a trial upon evidence is a game, such limitations have a place in the law of evidence; if it is the employment of rational and practical methods in the discovery of truth, such limitations should be discarded without scruple." The style of Mr. Wigmore gives some evidence that he is fond of Jeremy Bentham, whose virile work, the "Rationale of Judicial Evidence," is often quoted by him. It may be thought by some to suggest the pedantic. The new nomenclature which Professor Wigmore has brought into the law of evidence will be in mind in this connection. It will require some time for its complete assimilation into the practitioner's vocabulary. The lawyer of the old school will hesitate before grasping the clear significance of "Prospectant," "Retrospectant" and "Concountant" evidence; of "Emotional" capacity as applied to a witness; of "Viatorial" privileges; "Anti-Marital" testimony, "Auxiliary Probative Policy," "Autoptic Proference," "Curative admissibility," "Procedure of admissibility," "Preferential" rules, "Prophylactic" rules, "Simplificative" rules, "Quantitative" rules, "Verbal acts" and the like.

While in many cases, if not in most, this use of new terms, new to the law of evidence, would be an improvement over some of those much longer in use if there was a real necessity for such change, yet in view of the long and universal use of the old terms it is at least a change of doubtful utility.

It must certainly be said that there is little reason for concluding, not-

withstanding peculiarities in the choice of words referred to, that the author is concerned with making a show of learning for any selfish end. The book is a book of *real* learning evidently written as the author's contribution to the literature of a subject, in the discussion of which he felt he might be helpful to the profession. From what has been said it is not to be concluded that this work is one for the special student of evidence alone. Too much cannot be said in praise of the scholarship and learning exhibited in it, but much must be said in commendation of the work as a working tool for the practitioner. Not forgetting that the literature of this subject has, within a twelve month, been enriched by the publication of the work of other writers, it must be said that the practicing lawyer of today can find nowhere better statement of the law of evidence as enforced by the courts now, with a more intelligent or more exhaustive use of the case law of the subject, than in this work. The difference between the lawyer who can state the rule of law and nothing more, and the lawyer who not only knows the rule of law but its history and the principles which underlie, is the difference between the lawyer with little equipment for the assistance of the court and the lawyer always able to be helpful. It is not so often troublesome to discover the rule as, knowing the rule, to make proper application of it. No one is well able to do this who knows not the foundation, the reason of the rule, and no work yet published will do so much to assist the American practitioner to this end, in the law of evidence, as that of Professor Wigmore.

One or two noteworthy features in the make-up of the work will not be overlooked. The plan of the author places quotations from leading cases, following, in the text, the statement of propositions of law. This plan adds substantially to the pleasure and convenience of the reader. It is too true that such quotations when carried into footnotes are practically lost to the average reader. The alphabetical arrangement, by states, of case citations, with the date of the decision, where that seems important, are valuable features. One of the features for which much can be said is the completeness of statute citations bearing upon the law of evidence. These citations cover the statutes of England, the Canadian Provinces, and of the United States, the several states and territories. Illustrations of the completeness of this use of statutes may be found in the collection affecting the qualification of witnesses, on pages 591-629; in the collection of the recording laws so far as they affect the law of evidence, on pages 1458-1471; of the laws for the taking of depositions, on pages 1770-1782; those providing for the attestation of writings, on pages 1611-1613; those providing for the authentication of judicial records, on pages 2143-2152, and those affecting the proof of foreign law, on pages 2160-2168.

It is impossible in the space at command to call attention to the detail of discussion of propositions treated, many of which are most admirable expositions of most interesting and oftentimes difficult subjects, most of which are very satisfactory indeed and few of which are we inclined to find fault with.

As illustrations of treatment which are helpful, exhaustive and many times entirely original, attention may be called to the discussion of the

question of whether admissibility is for the court or jury in case of dying declarations, confessions, and the like, §§ 497, 587, 861, 1451, 2550; of the hypothetical question, §§ 672-684. Particular paragraphs here might mislead, but the discussion as a whole is clear and good. The author's contention in paragraph 688 that it is desirable that a physician should be permitted to pronounce an opinion on information furnished by the nurse of a patient, would seem upon principle to be of doubtful correctness. A doctrine that courts are to receive offered evidence because it is such as persons in daily life are in the habit of acting upon is a dangerous one. Were this once conceded we would have little use for much of our law of evidence. The treatment of the "leading question" is sound but might have gone farther in criticism of the too frequent use of objection that a question is leading.

His criticism of the passive attitude of the presiding judges in our state courts, examples of which may be found in §§ 21 and 983, is just. His contention for broader and freer exercise of the discretion of the court is sane. §§ 862, 983, 987, 1003, 1005i, 1027, 1194 are illustrations of his attitude on this subject.

The treatment of the subject seems throughout well balanced. Where there is need of full discussion by reason of the condition of the law upon some particular topic, the need is met, but there are few, if any, instances where the discussion seems overloaded.

The work is an invaluable contribution to the literature of the subject and will take its place among the great works of modern times in the greater field of general legal literature. V. H. LANE.

THE INTERSTATE COMMERCE ACT and FEDERAL ANTI-TRUST LAWS, including the Sherman act, the act creating the Bureau of Corporations, the Elkins act, the act to expedite suits in the Federal courts, acts relating to telegraph, military, and post roads, acts affecting equipment of cars and locomotives of carriers engaged in interstate commerce, with all amendments, with comments and authorities, and rules of practice and forms used in practice before the Interstate Commerce Commission. By William L. Snyder, of the New York Bar. New York: Baker, Voorhis & Company, 1904. pp. xxiii, 380.

This is a valuable manual of the foregoing statutes, with full annotations from the Federal decisions relating thereto, given section by section. The work is divided into six chapters: Chapter I, Constitutional provisions and authorities, 31 pages, giving a short discussion of commercial questions, personal and private rights, police powers of the states, sumptuary laws, grain elevators, state and federal taxation, and taxation of drummers and commercial agents. Chapter II, The Interstate Commerce Act, 215 pages, including the original act, the Elkins act of February 19, 1903, the Expedition act of February 11, 1903, the Immunity of Witnesses act of February 11, 1893, the Accident Reports act of March 3, 1901, and the remedy by mandamus to move traffic and furnish cars. Chapter III, The Sherman Act, 57 pages, including the exemption of witnesses who give incriminating testimony under